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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

TROY V. POST, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

BILL M. ALLEN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

LEROY W. PICKETT, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Troy V. Post, Jr., Bill M. Allen and Leroy W. Pickett pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgments of conviction entered by the United States District Court for the District of Columbia on January 6, 1967.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet officially reported, is printed herein as Appendix A.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the convictions was entered on October 15, 1968. No petition for rehearing was filed. On November 6, 1968, the Chief Justice endorsed an order extending the time for filing a petition for a writ of certiorari to and including December 14, 1968. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a supplemental jury instruction patterned after that in *Commonwealth* v. *Tuey,* 8 Cush. 1 (Mass. 1851), as approved in *Allen* v. *United States,* 164 U.S. 492 (1892), conflicts with currently accepted principles of the jury system.

2. Whether a so-called "promotor instruction", to the effect that if the jury found the defendants to be "promotors" of Lakewood Country Club, Inc., the fiduciary obligation of promotors applied and that any violation of such fiduciary obligations would violate 18 U.S.C. §1341, improperly lessens the government's burden of proof in a criminal case. Whether the use of such an instruction, and its approval by the Court of Appeals, conflicts with the holding in *Epstein* v. *United States,* 174 F. 2d 765-766 (6th Cir. 1949).

3. Whether, after the government had shown the diversion of large sums of money to other enterprises,

the exclusion by the trial judge of evidence relating to the return of over $100,000 to the Lakewood Country Club, Inc. complex presented such a distorted picture as to call for a new trial.

STATEMENT OF THE CASE

The petitioners were indicted June 23, 1964, in twenty counts of mail and wire fraud, 18 U.S.C. §§ 1341, 1342 and conspiracy, 18 U.S.C. § 371, arising from the organization, financing, construction, operation and ultimate financial collapse of the Lakewood Country Club complex in Rockville, Maryland.

The District of Columbia, in common with many other areas of the country in the late 1950's, was undergoing a golf explosion and the petitioners conceived the idea of forming and organizing a golf and country club complex which they would own, which would be managed professionally and the profits of which would enure to them. Through local realty firms, they sought a tract of land adequate in size and sufficient in geographic features within close proximity of the District of Columbia on which to locate such club. They finally located approximately 200 acres of such land in Montgomery County, Maryland, and acquired an option to lease the land and, ultimately, to purchase it.

Petitioners' promotional crusade, as the Court of Appeals observed, "met instant and spectacular success, garnering membership fees aggregating more than $1,250,000". (A.-4a) Construction of the club's facilities got under way and the petitioners, acting through wholly-owned corporations, made profits on a land lease to the club and on contracts for the construction of its facilities. (A.-5a, n. 10) During a 20-month

period, they were also paid salaries, commissions and fees pursuant to a variety of intracorporate arrangements. In addition, they advanced monies collected for initiation fees to other country clubs in which they were financially interested. The evidence fairly permits of the conclusion that the club membership was unaware of the extent of petitioners' ownership in the country club complex and the degree to which they were profiting from it.

In the fall of 1960, the club's funds were exhausted and all other facilities being virtually completed, construction on its clubhouse came to a halt. Estimates varied from 60-80% as the extent of completion. A membership meeting in December of that year culminated in the election of a new board of directors which, during the next several months, endeavored unsuccessfully to negotiate an accord with petitioners, Finally, in March, 1961, suit was filed in the United States District Court for the District of Columbia seeking a conservatorship, the ouster of petitioners, and the recepture of monies claimed to have been wrongfully diverted. A conservator was appointed for all of the corporations involved in the affair, and the petitioners were prohibited from further operation of the club. Thereafter, in February 1962, the litigation was settled by a consent order. (A.-6a, 15a-17a)

The indictment leading to petitioners' convictions charged, in substance, material misrepresentations associated with the sale of memberships, including the use of the names of advisory committee members (the advisory committee being "generally nonfunctional", A.-3a), statements as to the "limited number" of life memberships and their nonassessable character (see A.-6a), and the nondisclosure of petitioners' interests

in and profits from the club. At trial, the core question, as in most mail fraud cases, was whether Lakewood Country Club was, as the Government contended, a scheme to defraud prospective members or, as petitioners insisted, a legitimate business venture that unexpectedly and unfortunately failed.

Trial in this case lasted thirty-four days, extending over more than an eight-week period. More than two score witnesses testified, both for the Government and for the defense. The defendants, themselves, testified at some length. Hundreds of exhibits were introduced on both sides. The jury deliberations extended for more than twenty hours over a four-day period. They returned once to have the entire charge re-read and, again, to report their inability to agree. Over the objection of defense counsel, the trial judge gave the instruction from *Commonwealth* v. *Tuey,* 8 Cush. 1 (Mass. 1851). The jury returned some five hours later and convicted each petitioner on the conspiracy count and thirteen substantive counts.[1]

REASONS FOR GRANTING THE WRIT

1. This case presents in sharp focus the question of the continuing validity of the so-called "Allen charge", originally approved by this Court in *Allen* v. *United States,* 164 U.S. 492 (1896). The Court below did not discuss the "Allen charge", having reaffirmed its continuing validity in the precise form here used in *Fulwood* v. *United States,* 369 F. 2d 960, 963 (D.C. Cir. 1966), decided after the convictions here but before argument of the appeal (A.-3a, n. 3).

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[1] The petitioners were acquitted on four counts and three counts were either withdrawn or dismissed at the conclusion of the Government's case.

This Court has not taken the opportunity to speak on *Allen* at any length this century. In *Burton* v. *United States,* 196 U.S. 283, 306-308 (1905), *Allen* was approved by implication but the particular charge given in that case was held to call for reversal. *Lias* v. *United States,* 284 U.S. 584 (1931), was a *per curiam* affirmance, citing *Allen.* *Jenkins* v. *United States,* 380 U.S. 445 (1965), was reversed upon a virtual concession by the Solicitor General. And, in *Kent* v. *United States,* 383 U.S. 541, 552 (1960), the "Allen charge" point was not reached as the case was reversed on other grounds. Indeed, the Court has been singularly silent since *Allen.* But, the rumbling of discontent can be heard from below. State courts, individual federal judges, the authors and, most recently, a distinguished committee of the American Bar Association have re-evaluated *Allen* and condemned its use. Circuit Judge Coleman, concurring in *Thaggard* v. *United States,* 354 F. 2d 735, 739 (5th Cir. 1965), ventured the opinion:

> "I entertain the thought that if it [the 'Allen charge'] were submitted to the Supreme Court today the result might not be the same as it was in 1896."

The highest courts of at least two states have recently indicated that the "Allen-charge" is no longer to be used. *State* v. *Randall,* 137 Mont. 534, 353 P. 2d 1054 (1960); *State* v. *Thomas,* 86 Ariz. 161, 342 P. 2d 197 (1959).

In *State* v. *Thomas, supra,* the Supreme Court of Arizona wrote:

> "We are convinced that the evils far outweigh the benefits, and decree that its use shall no longer be tolerated and approved by this court." 86 Ariz., at 166, 342 P. 2d, at 200.

Lower federal court judges, too, have had recent occasion, albeit in dissenting opinions, to decry to continuing use of the "Allen-charge". Circuit Judge Brown, dissenting in *Huffman* v. *United States,* 297 F. 2d 754, 755-759 (5th Cir. 1962), observed:

> "The fact is that in many phases of criminal law we have come a long, long way since 1896. There is no longer any place for the Allen charge.
>
> * * * *
>
> "The time has come, I think, to forbid this practice. Like the silver platter, this is too dear to keep. The cost of fundamental fairness is too great."

Again, dissenting in *Walker* v. *United States,* 342 F. 2d 22, 28 (5th Cir. 1965), he wrote:

> "It is high time we repudiate the use of the Allen charge. It is high time we remove the dynamite as an inducement to the awesome judicial responsibility of a jury verdict on which a man's life, his liberty, his freedom rests."

Circuit Judge Wisdom, dissenting in *Andrews* v. *United States,* 309 F. 2d 127, 129 (5th Cir. 1962), has observed:

> "The Allen charge causes more troubles in the administration of justice than it is worth."

And, see Circuit Judge Coleman's concurring opinion in *Thaggard* v. *United States, supra.* Even those courts which have approved the "Allen-charge", seemingly with some reluctance, have used the occasion for some critical observation about its use. *Green* v. *United States,* 309 F. 2d 852, 854 (5th Cir. 1962) ("There is small, if any, justification for its use."); *United States*

v. *Rogers,* 289 F. 2d 433, 435 (4th Cir. 1961) (" . . . the Allen-charge itself, approaches ultimate permissible limits . . .").

Mr. Justice Clark, in *Progress of Project Effective Justice—A Report on the Joint Committee,* 27 J.Am. Jud. Soc'y 88, 90 (1963) has written: "Nor do we circulate the 'Allen charge' to the new judges as I used to do when heading up the criminal division in the Department of Justice. Allen is dead and we do not believe in dead law." And, a lucid and persuasive critique of *Allen* is found in *Note, Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge,* 53 Va.L.Rev. 123 (1967).

Finally, a distinguished Committee of the American Bar Association chaired by Judge Walter V. Schaefer has prepared American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Trial by Jury* (May 1968). The House of Delegates of the Association noted its approval, with changes not here relevant, in August. 54 A.B.A.J. 1020-1021 (Oct. 1968). In pertinent part, the Advisory Committee wrote:

> "The decision of the Advisory Committee . . . is based upon a growing body of opinion to the effect that the *Allen* charge and variations thereof are coercive, that they cause serious difficulties for the administration of criminal justice by providing the basis for many appeals and, indeed, that they may now be viewed as an unconstitutional invasion of the province of the jury.
>
> * * * *
>
> "For these reasons, the Advisory Committee has concluded that the *Allen* charge should not be used." *Standards, supra,* 150, 156.

In view of the recent body of criticism, judicial and otherwise, of the "Allen-charge", it is submitted that this Court, for the first time this century should re-examine *Allen* and either justify its continuing validity or finally decree the end of its usefulness.

The charge as given by the trial judge in this case came directly from *Commonwealth* v. *Tuey, supra,* and reads as follows:

> "The mode provided for deciding questions of fact in criminal cases is by a verdict of the jury. In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellow jurors; yet in order to bring the minds of 12 jurors to a unanimous result, each juror must examine the question submitted with candor, with a proper regard and deference to the opinions of each other. You should consider that *the case must at some time be decided;* that you are selected in the same manner and from the same source from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to 12 jurors to decide it, or that more or clearer evidence will be produced on the one side or the other. With this view, *it is your duty to decide the case* if you can conscientiously do so.
>
> "In conferring together, you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments. On the other hand, *if much the larger* number of your panel are for conviction, *a dissenting juror should consider* whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many jurors equally honest, equally intelligent with himself, and who have heard the same evidence with the same atten-

> tion and with an equal desire to arrive at the truth and under the sanction of the same oath. And, on the other hand, *if a majority are* for acquittal, the minority ought to seriously ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellow jurors." (Emphasis supplied)

The language of the charge is necessarily coercive of the minority of jurors. The jury is told that the minority should listen carefully to the view of the majority, but no balancing provision is made for the majority to be attentive to the views of the minority. The jury is told the case must be decided. Yet, as the Fifth Circuit stated in *Green* v. *United States,* 309 F. 2d 852, 855 (5th Cir. 1962), there is no "legal rule that the majority of jurors have a better judgment than the minority." And, "a mistrial is as much a part of the jury system as a unanimous verdict." Yet, *Allen,* in fact, says that the case must be decided and that the majority must prevail. As Circuit Judge Coleman, dissenting in *Thaggard* v. *United States, supra,* wrote:

> "So, there the previously reluctant juror stands, fancying himself in opposition to the wishes of a United States Judge, which is about the last position in which he ever wanted to find himself. He is only exercising everyday human nature when he gets out of that unhappy predicament just as quickly as he can."

This is too great a price to pay and the petitioners urge this Court to re-examine the merits of the *Allen* charge and to decry the giving of an Allen type charge at a critical time of jury deadlock.

2. Over the vigorous objection of the defendants, the trial court gave a "promotor instruction".[2]

The instruction had the effect of telling the jury that the petitioners were the promotors of the Lakewood Club, that as promotors they stood in a fiduciary relationship to the Club and to present and prospective members, that this fiduciary relationship required the utmost in good faith, full disclosure, no secret profits and, finally, that a breach of their fiduciary obligations was an act of fraud.

The petitioners submit that the application of the promotor fiduciary concept to a criminal mail fraud trial misallocates the burden of proof and permits a conviction not upon a knowing and calculated intent to defraud, but upon something akin to constructive fraud. The giving of this instruction by the trial court, and its approval by the Court of Appeals, below, places the District of Columbia Circuit in direct conflict with *Epstein* v. *United States,* 167 F. 2d 754 (6th Cir. 1949) and with *Shushan* v. *United States,* 117 F. 2d 110, 115 (5th Cir. 1954); see also *Bradford* v. *United States,* 129 F. 2d 274, 276 (5th Cir. 1942).

The most careful analysis of the distinction between constructive fraud, such as might make an individual civilly liable, and the type of conduct required to violate 18 U.S.C. § 1341, is found in *Epstein, supra,* in which the court wrote:

> "Courts speak of actual or active fraud as contrasted with constructive fraud. Actual fraud as being defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right and which accomplishes the end designed. It requires intent to deceive or defraud . . . . To

[2] The Instruction is set forth in full at A.-17a, n.51.

constitute actual fraud there must be such a fraud as affects the conscience . . . . Constructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public interests. Constructive fraud may be found merely from the relation of the parties to a transaction or from circumstances and surroundings under which it takes place . . . . *It is said that constructive fraud is a term which means essentially nothing more than the receipt and retention of unmerited benefits* . . . .

"In order to prove a scheme to defraud under the mail fraud statute, there must be proof of a scheme embracing active or actual fraud. A charge of using the mails to carry out a scheme to defraud cannot be maintained on proof of mere constructive fraud."

* * * *

Conceding this to be the rule of law, nevertheless, the government attempts to neutralize its effects by emphasizing that the 'elements of fraud developed in civil cases are applicable in prosecutions under the mail fraud laws.' . . . And use of the mails to defraud is not limited to what would give rise to a common-law action for deceit . . . . *Assuredly, we must consider fraud in mail fraud cases according to the standard of what fraud is in civil cases. That, however, is no qualification of the rule that to sustain a charge of using the mails to defraud, there must be proof of an actual fraud, rather than a constructive fraud;* and the fact that the crime of using the mails to defraud is not limited to what would give rise to a common-law action for deceit means, for instance, that a showing of loss to the victim is not necessary to conviction for mail fraud, it does not imply *that constructive fraud, or anything less than actual fraud, can sustain the charge of using the mails to defraud."* (Emphasis supplied.)

Notwithstanding the efforts of the court below to save the so-called "promotor instruction" by pointing to such words as "knowingly" and "intentionally" (A.-20a), the full tenor of that instruction is to equate nondisclosure, secret profits, and lack of proper use of funds, the classic hallmarks of civil fraud, with the active specific intent to defraud required for violation of 18 U.S.C. § 1341. Other courts have held that any instruction demoting the intent required below a knowing purpose and design to defraud is reversible error. *West* v. *United States,* 68 F. 2d 96, 98 (10th Cir. 1923); *Frank* v. *United States,* 220 F. 2d 559, 565 (10th Cir. 1955). The "promotor instruction" does just that and its use, if approved, will immeasurably broaden the already expansive mail fraud statute. See, by way of anology, *Getchell* v. *United States,* 282 F. 2d 681 (5th Cir. 1960).

3. The Government's testimony showed, *inter alia,* a large sum of money going from the Lakewood complex, through Golf Contractors, Inc., for construction of a Texas club. During the testimony of the petitioner Post and that of one Wayne Freeland, there was evidence introduced of a joint venture agreement between petitioners, on the one hand, and Golf Contractors, Inc., on the other, to construct a golf course at Glen Haven in Texas. There were a series of promissory notes signed personally by Freeland and one Wayne Hayes and, finally, a substitute note for $104,000, made payable to Golf Contractors, Inc., which had been shown to be a wholly-owned subsidiary of petitioners. This note was supported by a deed of trust on the Texas property. All of this occurred prior to the imposition of the conservatorship. *Supra,* p. 4. Subsequent to the conservatorship, at least $82,000 was returned through Golf Contractors, Inc. to the Lakewood Country Club as a result of the prior arrange-

ments which had been made at the time the money was loaned. The court excluded this testimony on the grounds that the return occurred after the imposition of a conservatorship.[3]

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[3] A detailed offer of proof was made:

"I offer to prove through Mr. R. L. Ragsdale, the Vice President of Southern Title Company, Incorporated, that he has been Vice President of the Southern Title Company, Incorporated, since at least 1955, that during the period 1961 and 1962 he was personally acquainted with transactions relating to the Glen Haven Club, Incorporated, of Houston, Texas, which later became Sandy Lakes Country Club, Incorporated, of Houston, Texas, and a contract between that club and Golf Contractors, Incorporated.

"I further offer to prove through this witness, that on or about December 8th, 1961, the Glen Haven Country Club, Incorporated, of Houston, Texas, filed restated and amended articles of incorporation with the Secretary of State of the State of Texas, as a part of which its name was changed to Sandy Lakes Country Club.

"And, as a part of that, I would proffer defendants' exhibit number 346, a certified copy of the amended articles of incorporation, certified to by the Assistant Secretary of State of the State of Texas.

"I would further offer to prove through this witness, that the then Sandy Lakes Country Club of Houston, Texas, caused a loan to be negotiated from the Gibraltar Savings Association in the amount of $500,000.00, that this amount of $500,000.00 plus certain amounts available was disbursed by the Southern Title Company, Incorporated of Houston, Texas, by and under the supervision of this witness, Mr. Ragsdale.

"In that connection, I would offer the disbursement schedule, defendants' exhibit number 343.

"A part of that disbursement schedule is a check in the amount of $82,000.00 dated May 16, 1962, drawn on the Citizens State Bank of Houston, Texas, and made payable to Vinton E. Lee, Sequestrator, Sandy Lakes Country Club Mortgage Note, and bearing on the back the notation "Pay to the Order of Security Bank for Deposit to the Credit of Vinton E. Lee, Sequestrator of Sandy Lakes

The paramount issue in this case, as in virtually every mail fraud case, is the good faith of the defendants and the critical issue to be decided, indeed the only issue, since mailing and loss were clearly established and not seriously contested, is whether the petitioners did everything within their power to produce what

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Country Club Mortgage Note Payable to Golf Contractors, Inc., as a part of Lakewood Country Club, Inc., et al. Court order of January 22, 1962.

"That check is defendants' exhibit number 344 which I would offer as a part of the proffer.

"Following the entry of that check, or the drawing and submission of that check,— Withdraw that, please. Prior to the drawing of that check, this witness, as an officer of the Southern Title Company, would identify a telegram purporting to be signed by Vinton Lee and addressed to Southern Title Company, 1104 Rusk Avenue, Houston, Texas, and which bears the defendants' exhibit number 342, and which reads as follows:

[Reading] 'We are prepared to forward the note to you at the time of settlement so that you may mark it paid and satisfied and return it to the maker in exchange for a check to Vinton E. Lee, Sequestrator, Sandy Lakes Country Club Mortgagee Note.

'The balance of the note payable to Golf Contractors, Inc., from Sandy Lakes Country Club is $82,000.00.'

"It is signed 'Vinton E. Lee, Sequestrator, Sandy Lakes Country Club Mortgage Note'.

"We would offer that telegram as part of the proffer.

"Following the drawing of the check by the Southern Title Company, it was forwarded to Mr. Lee pursuant to a letter signed by this witness, R. L. Ragsdale, and bearing defendants' exhibit number 345, which we would proffer as an offer as a part of this proffer.

"This letter bears the date May 16, 1962. It's addressed to Mr. Vinton E. Lee, Investment Building, Washington, D. C.

[Reading] 'Dear Sir: Pursuant to your telegram of May 4, 1962, to Southern Title Company, we enclose herewith Southern Title Company Check No. 165247 to your order in the amount of $82,000.00, as payment in full of the note pay-

they had promised to produce, i.e. a golf club course on the Lakewood site. As stated in *Lefkowitz* v. *United States*, 230 Fed. 664, 666 (2d Cir. 1921), it is—

> "competent to show *every part and parcel of such business* or the method of conducting it, calcu-

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able to Golf Contractors, Inc., and a release of the mortgage lien securing the payment of said note.'

[Mr. Bergan continuing in the reading of Defendants' Exhibit 345 for identification re proffer of proof.]

'We have consulted Mr. Walter P. Zivley, the trustee in said Deed of Trust, and he has approved your execution of the release of the mortgage lien. Please execute and acknowledge the enclosed release before a Notary Public and return the same, together with the original note marked "Paid" and any other papers you may have relating to this transaction.' It is signed: 'Very truly yours,

R. L. Ragsdale
Vice-President.'

"Following that, Mr. Ragsdale would identify the original of the mortgage note for $104,000.00, dated June 14, 1961. And it bears Defendants' Exhibit Number 347, which we would proffer in evidence as a part of this proffer, marked on the bottom 'Paid May 16, 1962, by Southern Title Company.' And the initials are 'R.L.R.', which this witness would identify as his own.

"Finally, this witness would identify Defendants' Exhibit Number 348—and all of these exhibits which I have mentioned, incidentally, come from this file—which is a Release of Lien filed in the County Courthouse before the County Clerk in and for the County of Fort Bend, Texas, by which this Deed of Trust, Defendants' Exhibit 347, was released, and this Deed of Trust, Defendants' Exhibit 348, is signed by Vinton E. Lee, and it includes one paragraph:

[Reading] 'Whereas, said note is now owned and held by Vinton E. Lee, Sequestrator, and to whom said note has been paid in full.'

"We would offer that document, defendants' exhibit 348, as part of the proffer."

> lated to shed light upon the intent and purposes of its managers." (Emphasis supplied)

Similarly, in *United States* v. *Brandt,* 196 F. 2d 665, 657 (2d Cir. 1952), the court, in reversing a mail fraud conviction, wrote:

> "Culpable intent or lack of good faith is not merely an element of the crime of fraudulent use of the mail, . . . it is in fact practically crucial where, as here, the scheme and the mailing are admitted . . . and hence, since it may be only inferentially proven, 2 *Wigmore on Evidence,* 300, 302, 2d Ed. 1940, *no evidence or actions which bear even remotely* on its probability *should be withdrawn from the jury* unless the tangential and confusing elements interjected by such evidence clearly outweigh any relevancy it might have." (Emphasis supplied)

And see *Little* v. *United States,* 73 F. 2d 861, 867 (10th Cir. 1934):

> "But the question of the good or bad faith of defendant when the letters were mailed was a critical issue of fact. Events occurring after the letters were mailed might shed light upon the intent of defendant when the letters were mailed."

The evidence which the court excluded effectively precluded the petitioners from showing certain acts "calculated to shed light upon [their] intent and purpose." *Lefkowitz* v. *United States, supra.*

The government was permitted to show a large sum of money which went from the Lakewood complex to the Texas club. But the figure was wholly misleading because the money was loaned and returned, as the proffered testimony would have shown. Who knows what impression the jury might have reached had the

petitioners been permitted to show that a valid business arrangement was made and that by far the vast majority of the money thus loaned was returned. Regrettably this was highlighted by the closing argument of Government counsel.

> "We find them sending a net of $93,000.00 and some dollars to their other clubs. When I say their other clubs, I mean Golf Contractors, Inc., ... That, ladies and gentlemen, is a net figure. That take into consideration every dime that came back from those other corporations. $93,000.00 is net."[4]

Thus, a wholly false impression was created by the evidence and the petitioners were not permitted to correct it. Fundamental fairness requires more.

A majority of the court below agreed with the trial court that this evidence was inadmissible. Senior Circuit Judge Fahy, concurring, found it admissible, but did not dissent from affirmance, "deeming this restriction upon the evidence not so harmful as to call for reversals." (A.-21a)

Particularly in view of the government's closing argument, the exclusion of evidence showing that equally large sums came back put an entirely different cast upon the case than the facts warranted. While we need not, and do not, argue that this evidence would have been dispositive of guilt or innocence, it is a fact that the jury was in conference for more than twenty hours, that they returned once to have the entire charge read, and that they returned later to announce a deadlock. Under such circumstances, it was prejudicial error not to admit this evidence.

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[4] A motion for mistrial was made and denied.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,861

TROY V. POST, JR., *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

No. 20,862

BILL M. ALLEN, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

No. 20,863

LEROY W. PICKETT, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeals from the United States District Court
for the District of Columbia

Decided October 15, 1968

Mr. Raymond W. Bergan, with whom *Mr. Thomas R. Dyson, Jr.,* was on the brief, for appellants.

Mr. Roger A. Pauley, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Messrs. David G. Bress,* United States Attorney, and *Frank Q. Nebeker,*

Assistant United States Attorney, were on the brief, for appellee. *Mr. Scott R. Schoenfeld,* Assistant United States Attorney, also entered an appearance for appellee.

Before FAHY, *Senior Circuit Judge,* and WRIGHT and ROBINSON, *Circuit Judges.*

ROBINSON, *Circuit Judge:* Appellants were convicted by a jury of conspiracy[1] and mail fraud[2] stemming from their activities in the promotion of Lakewood Country Club, in the area of Rockville, Maryland, and the concomitant sale of memberships therein. On these appeals, they allege error in three rulings by which evidence was excluded as irrelevant to their efforts to show their good faith in transactions impugned by the indictment. They also attack an instruction which defined for the jury appellants' criminal liabilities as promoters of the club. Two additional contentions

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[1] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or agency thereof in any manner or for any porpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 371.

[2] "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1341.

which they advance are effectively foreclosed by decisions rendered subsequent to their trial.[3]

In the summer of 1958, appellants conceived the blueprint for a new country club to be developed in the vicinity of Washington.[4] Locating a suitable site in 1959, they organized four corporations through which the club was to be established and operated,[5] and embarked upon the promotional phase from which emanated the events giving rise to the indictment. An advisory board, generally nonfunctional, of well know citizens was organized, a sales

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[3] The argument that the trial judge erred in giving the "Allen charge," *Allen* v. *United States*, 164 U.S. 492 (1892), is frustrated by *Fulwood* v. *United States*, 125 U.S. App. D.C. 183, 369 F. 2d 960 (1966), *cert. denied* 387 U.S. 934 (1967). The claim that the indictment should have been quashed because of delay incidental to its procurement is nullified by *Tynan* v. *United States*, 126 U.S. App. D.C. 206, 207-09, 376 F. 2d 761, 762-64, *cert. denied* 389 U.S. 845 (1967), which requires prejudice—a condition the record here negates—resulting from the delay. There is no occasion for us to reconsider these decisions. See *District of Columbia* v. *Grimes*, No. 21,555 (D.C. Cir. March 28, 1968) at 9-10 (concurring opinion) and cases cited.

[4] Their plan, they say, was to create a golf and country club complex which they would own and manage, and from which they would reap all profits. Lacking experience in such matters, they proposed to engage the necessary professional personnel to make the project work.

[5] One, Lakewood Country Club, Inc., was a nonstock nonprofit corporation, no part of the net earnings of which could inure to the benefit of any director or member. Its directorate consisted of three of appellants' friends, and it was to be the sublessee of the club premises. The others, all business corporations of which appellants were the sole stockholders and directors, were P.A.P., Inc., which was to be the lessee, and in turn the sublessor to Lakewood Country Club, Inc., of the club property; Lakewood Management Corporation, which was to operate the club; and Country Club Developers, Inc., which, as prime contractor under agreement with Lakewood Management Corporation, was to build the club's facilities.

office was opened and a sales staff hired, and a thoroughgoing campaign for members was launched. There was extensive newspaper advertising, and tens of thousands of direct mail advertisements were sent to area residents. The promotional literature was issued under the apparent auspices of the advisory board, and appellants' names were omitted.

Opportunities for affiliation with the incipient club assumed the form of $1,000 life memberships and $300 regular memberships, and the distinctive characteristics of each were publicly proclaimed. Life members would be immunized from all dues, assessments and minimum spending requirements, but regular members would be required to pay monthly dues. Life memberships would also be in "limited number;" applicants therefor were told that their ratio to others would be about one in ten, and the maximum number was variously fixed between 100 and 300. By October 1, 1960, however, 1,124 life memberships had been sold, as compared with only 719 regular memberships, and the club's bylaws, when distributed, authorized the directors —appellants' appointees—to impose a minimum spending requirement upon all members irrespective of class.[6]

Appellants' promotional crusade met instant and spectacular success, garnering membership fees aggregating more than $1,250,000.[7] While membership solicitations continued unabatedly, construction of the club's facilities got under way, and proved to be a lucrative enterprise for appellants. Acting through their wholly-owned corporations,[8] they turned handsome profits on a land lease

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[6] This requirement, however, was never invoked while appellants operated the club.

[7] In addition to this amount, more than $250,000 was also collected from members for excise taxes.

[8] See note 5, *supra*.

to the club[9] and on contracts for the construction of its facilities.[10] They were also paid more than $200,000 during a 20-month period in salaries, commissions and fees pursuant to a variety of intracorporate arrangements. In addition, they advanced from the monies collected for initiation fees large sums to other country clubs in which they were financially interested.[11] The evidence warranted the conclusion that Lakewood's membership, actual and potential, remained unaware of appellants' proprietary stake in the country club complex and the extent to which they were profiting from it.

By the fall of 1960, the club's funds were exhausted, and construction on its clubhouse came to a halt.[12] A membership meeting in December culminated in the election of a new board of directors, which during the next several months endeavored unsuccessfully to negotiate an accord with appellants. Finally, in March, 1961, suit was filed in

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[9] The Club site was leased to P.A.P., Inc., for 50 years at an annual rental of $15,000, and with the lease was coupled an option to purchase. P.A.P., Inc., subleased to Lakewood Country Club, Inc., at a rental of $60,000 annually for three years only—meaning, necessarily, renegotiation at the end of that term.

[10] Country Club Developers, Inc., contracted with Lakewood Country Club, Inc., for the construction of facilities, and then subcontracted with others for the actual work at much lower costs. Among the facilities as to which there were substantial price differentials were the clubhouse ($625,000 and $543,000), the golf course ($245,000 and $165,000) and the tennis courts ($43,500 and $16,000).

[11] One such transaction was a $63,000 transfer to Golf Contractors, Inc., a Texas company owned by appellants, which is discussed in Part III, *infra*.

[12] Other facilities, including the golf course and swimming pools, were completed and in use. Testimony for the Government made the point that all facilities could "easily" have been constructed from the monies collected during the first few months of the membership campaign.

the District Court for the District of Columbia seeking a conservatorship, the ouster of appellants, and the recapture of monies claimed to have been wrongfully diverted.[13] On March 31, 1961, a conservator was appointed for all of the corporations involved in the affair, and appellants were prohibited from further operation of the club. Thereafter, in February, 1962, the litigation was settled by a consent order.[14]

The indictment leading to appellants' convictions charged, in substance, material misrepresentation associated with the sale of memoerships, including the use of the names of the advisory committee members, the statements as to the "limited number" of life memberships and their nonassessable character, and the nondisclosure of appellants' interests in and their profiteering from the club. At the trial, the core question was whether Lakewood Country Club was, as the Government contended, a scheme to defraud prospective members or was, as appellants insisted, a ligitimate business venture that unexpectedly and unfortunately failed. Appellants concede that the record contains evidence which amply supports the jury's verdicts.[15] They urge, however, that by virtue of the three exclusionary rulings, the jury was precluded from hearing evidence critical to their defense, and that, in consequence of the instruction under assault, was inadequately in-

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[13] *Lakewood Country Club, Inc.* v. *Post*, Civil No. 805-61 (D.D.C. filed March 15, 1961). See also *Lee* v. *Post*, Civil No. 1157-61 (D.D.C. filed April 17, 1961), which was instituted by the conservator after his appointment.

[14] Discussed in Part IV, *infra*.

[15] The indictment charged each appellant in one count of conspiracy, see note 1, *supra*, and 19 substantive counts of mail fraud, see note 2, *supra*. Three counts were withdrawn or dismissed at the close of the Government's case in chief. The jury convicted each appellant on the conspiracy count and 13 of the substantive counts, and acquitted on each of the remaining four.

formed as to the Government's burden of proof and the criminal intent prerequisite to conviction. With these contentions we do not agree, and we accordingly affirm the convictions.

I

We approach our review, against the factual backdrop summarized, of the three exclusionary rulings advertent to familiar admonitions validated by generations of judicial experience. "It is for ordinary minds," we are instructed, "not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical policy, and not in rules of logic." [16] Not the least of the evidentiary principles so shaped are those by which the relevance of proffered evidence is to be measured.

An inevitable concomitant of the Anglo-American legal system, with its sharp distinction in function between judge and jury, is "the rough and practical quality . . . noticeable in the whole law of probative value." [17] This is because "the Court will of course allow to be considered only such evidence as is worth submitting to men who will judge only by the most common and practicable tests." [18] As an even more significant consequence, "the effect is to require a generally higher degree of probative value for all evidence to be submitted to a jury than would be asked in ordinary reasoning." [19] For "[t]he Judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning, has constantly seen fit to

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[16] *Shepard* v. *United States*, 290 U.S. 96, 104 (1933).

[17] 1 J. Wigmore, Evidence § 28 at 409 (3d ed. 1940).

[18] *Ibid.*

[19] *Ibid* (emphasis omitted).

exclude matter which does not rise to a clearly sufficient degree of value."[20]

These factors, in turn, define broadly the dissimilar roles trial and appellate judges play in scrutinizing evidence the pertinence of which is in issue. "It is the duty of the trial judge," we have declared, "to determine relevancy in terms of the worth of the proffer. 'Each single piece of evidence must have a plus value,' something more than a minimum in a probative sense."[21] Just how much more is a determination which by its very nature, of course, exacts a careful and often difficult estimate in the context of all else that the trial involves. The very considerations that condition a criminal conviction upon incriminating proof beyond a reasonable doubt entitle the accused to ample latitude in evidentiary presentations from which such a doubt might fairly arise. On the other hand, the possibilities of confusion and false deduction from circumstances of nebulous significance are real dangers that cannot be casually ignored. Trial judges, occupying an excellent vantage point, must be afforded leeway in striking the balance,[22] a most delicate task when, as in the case at bar, the operations of the human mind are to be probed.[23]

Appellate judges, on the other hand, must accord to trial rulings on relevance a respect commensurate with the occa-

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[20] *Id.* at 409-10.

[21] *Frank R. Jelleff, Inc.* v. *Braden*, 98 U.S. App. D.C. 180, 188, 233 F. 2d 671, 679 (1956), quoting 1 J. Wigmore, Evidence § 28 at 410 (3d ed. 1940).

[22] See *Vareltzis* v. *Luckenbach S.S. Co.*, 258 F. 2d 78, 81 (2d Cir. 1958); *Miller* v. *Alexandria Truck Lines*, 273 F. 2d 897, 900-01 (5th Cir. 1960); *Metropolitan Life Ins. Co.* v. *Armstrong*, 85 F. 2d 187, 193 (8th Cir. 1936).

[23] See *Glasser* v. *United States*, 315 U.S. 60, 81 (1942).

sion.[24] "There is no bright line that divides evidence worthy of consideration by a jury, although subject to heavy counterattack, from evidence that is not,"[25] and we are not unmindful of "the inescapable remoteness of appellate review."[26] With these twin handicaps, we perform our reviewing function both carefully and deferentially lest "the perspective of the living trial is lost in the search for error in a dead record."[27] When the issue is close, relevance is primarily for the trial judge to gauge,[28] and we will not lightly overrule his considered judgment.[29]

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[24] The complexities of appellants' operations are portrayed vividly in the enormous record built in the District Court. The trial consumed 34 days over an eight-week period. Numerous witnesses testified on the ramified factual issues, and each side introduced scores of exhibits. The jury deliberated for 20 hours over four days, returning once to have the entire charge repeated, and again to report its then inability to agree. See note 3, *supra*.

[25] *Herman Schwabe, Inc.* v. *United Shoe Mach. Corp.*, 297 F. 2d 906, 912 (2d Cir.), *cert. denied* 369 U.S. 865 (1962).

[26] *Luck* v. *United States*, 121 U.S. App. D.C. 151, 157, 348 F. 2d 763, 769 (1965).

[27] *Glasser* v. *United States*, *supra* note 23, 315 U.S. at 88 (dissenting opinion).

[28] "Even in judicial trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence. [Citations omitted] Courts of appeal are less and less inclined to base error on such rulings." *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 236 (1947).

[29] "In the absence of a showing of a clear abuse of discretion, we will not say that he erred . . . ." *Frank R. Jelleff, Inc.* v. *Braden*, *supra* note 21, 98 U.S. App. D.C. at 189, 233 F. 2d at 680. See also *Hannan* v. *United States*, 76 U.S. App. D.C. 118, 120, 131 F. 2d 441, 443 (1942); *Maryland Cas. Co.* v. *Citizens State Bank*, 84 F. 2d 172, 174 (5th Cir. 1936); *Brigham Young Univ.* v. *Lillywhite*, 118 F. 2d 836, 841, 137 A.L.R. 598 (10th Cir. 1941). And see the cases cited *supra* notes 22 and 27.

II

In opposition to the Government's charge of conspiratorial and fraudulent conduct, appellants maintained that their constant aim was to provide the Lakewood members with all that had been promised. To support that claim, appellants were permitted to introduce evidence tending to show efforts, after as well as before the conservator's appointment, to extricate the club from its financial difficulties. On the same theory—relevance to good faith—appellants proffered a post-conservatorship proposition which, if consummated, would have provided one of several possible solutions of the problem.

This proposition was an offer, made subject to approval by the members and the court, to pay appellants $100,000 for their interests in the club, the offeror to complete the club's facilities and operate them for the members. The offer called for the alternative imposition of monthly dues or a minimum spending requirement upon life members, the option in this regard to be theirs. The membership, however, rejected this proposal, and the trial judge excluded it from the evidence. Because the offer was negotiated after the conservatorship,[30] and was conditioned upon a relationship between the members and the club different from that which appellants had represented, the

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[30] The offer, and the evidence excluded by the rulings considered in Parts III and IV *infra*, emanated from transactions occurring after the appointment of the conservator for the Lakewood-connected corporations. From this circumstance, appellants argue that the trial judge established the date of the conservator's appointment as an arbitrary cutoff point for evidence that might illuminate appellants' conduct. We do not find this to be so. Appellants were permitted to undertake proof of other transpirations after as well as before the conservatorship. Only with respect to the offer discussed in this Part did the judge deem the post-conservatorship character of the proffered item of sufficient importance to the ruling to justify mention, and even here the ruling also rested upon an additional consideration.

judge did not consider its virtues sufficient to elevate it to a good faith showing.

Acts occurring subsequent to a supposed criminal offense may in particular circumstances constitute admissible evidence bearing on innocence.[31] By the same token, an event superficially indicative of bad faith conceivably may be shown by a later transpiration to have actually involved a completely wholesome state of mind.[32] On the other hand, an ever-present reason demanding latitude for the ruling on admissibility is that what takes place, particularly after the fact, is "often feigned and artificial."[33] While the judge's function does not extend to a flat decision as to whether it is or not, it is his responsibility to calculate and weigh the propensities of the proffered evidence in both directions in determining whether it has a "plus value" favoring its admission.[34]

Even if, in the case at bar, the trial judge believed that the proposition in question was free from taint of artificiality, the fact remains that it embodied rights and liabilities of membership dissimilar to what they had previously appeared to be. The most salient feature of life memberships, as advertised in appellants' campaign, was their freedom from additional financial burdens. In specifying the onus of dues or a minimum spending requirement on life memberships, the offer departed radically from the assurances that had inspired their purchase.

Moreover, one of the principal complaints against appellants was that they concealed their proprietary interests

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[31] See *Starke* v. *State*, 322 Ala.App. 31, 16 So.2d 426, 427 (1944); *Boston* v. *State*, 94 Ga. 590, 21 S.E. 603 (1894).

[32] See, *e.g.*, *Hayes* v. *United States*, 227 F.2d 540, 543 (10th Cir. 1955), *cert. denied* 353 U.S. 983 (1957).

[33] 2 J. Wigmore, Evidence § 293 at 189 (3d ed. 1940).

[34] Text *supra* at note 21.

in the club and their arrangements for personal profit. The offer called for the payment of $100,000 to appellants for those interests, and the vesting of the club's ownership and operation solely in the offeror. Viewed, as well it could be, as a salvage effort by appellants at the expense of the life members, the proposal had little or no tendency to demonstrate appellants' good faith in the dealings to which the indictment referred.

III

We have mentioned that some of the monies collected from the sale of memberships in Lakewood Country Club were devoted to projects unrelated to the development of the club.[35] One such diversion served a complicated transaction involving Golf Contractors, Inc., a Texas corporation owned by appellants, and Glen Haven Club, Inc., another Texas corporation. Appellants and Golf Contractors contracted to construct a golf course for Glen Haven, and two of the Lakewood-related corporations,[36] then dominated by appellants, advanced approximately $63,000 to Golf Contractors for the job. This loan, to be liquidated from Glen Haven's payments to Golf Contractors, was evidenced by notes payable to Golf Contractors and secured by a deed of trust on the Glen Haven property.

After appellants were removed from control of the Lakewood complex, the Texas club[37] obtained a $500,000 loan.

[35] Text *supra* at note 11.

[36] These were Lakewood Country Club, Inc., and Country Club Developers, Inc. See note 5, *supra*.

[37] Through a change of name accompanying the amendment and restatement of its articles of incorporation, Glen Haven Club, Inc., had in the meanwhile become Sandy Lakes Country Club, Inc.

On settlement of that loan, $82,000[38] was deducted and forwarded to the Lakewood conservator, pursuant to arrangements previously made by him, to enable a release of Golf Contractor's deed of trust on the Texas property.[39]

The Government's case revealed the $63,000 advance to Golf Contractors, and appellants sought to show its eventual repayment as a circumstance signifying their good faith and the soundness of the loan from a business viewpoint. The trial court, after hearing counsel extensively, held that they could not do so, and this determination we are invited to upset.

Appellants' proffer did not intimate that, aside from arranging the terms and security for repayment of the loan, they played any role in connection with the return of the monies to the conservator.[40] The tendered evidence could hardly have shed light upon appellants' earlier intentions when the memberships were solicited; at best, it might have suggested that the advance was a sound business investment rather than a reckless disposal of funds.[41] But this fact was also irrelevant for, despite the apparent safety of the maneuver, it was nonetheless an impermissible diversion of the club's cash for appellants' own gain. They

[38] The reason for the discrepancy between the $63,000 borrowed and the $82,000 repaid is not apparent from the record. Appellant Post testified that Golf Contractors spent about $102,000 on the Glen Haven course, evidenced by Glen Haven's notes totalling that amount, but only three of the notes, aggregating approximately $53,000, were placed in evidence. From this we can only assume that Golf Contractors had some additional source of funds.

[39] Golf Contractors came into the conservatorship several months after it was established.

[40] So far as the proffer discloses, the arrangement therefor was made and conducted solely by the Lakewood conservator and the title insurance company settling the loan.

[41] That fact was inferable from the notes evidencing the promise to repay and the deed of trust securing the notes, both of which were placed in evidence at the trial.

solicited the funds by representing that they would be devoted to construction of the Lakewood club in Maryland, but used the funds, with a view to personal profit, for the construction of the Glen Haven course in Texas. That the loan was safeguarded, or was eventually repaid, could not alter the situation; the calculated, improper use of the money was itself an act of fraud which, when coupled with the precedent use of the mails to enable its perpetration, made the offense complete.[42] And the fact of repayment could, in the circumstances, contest neither the deliberate nature of the digression nor its underlying motivation.[43] Moreover, we are alert to the possibility of which the trial judge was forewarned, that admission of the evidence would have added a broad collateral area to an already lengthy and complicated trial.[44] We think the trial judge remained on firm ground in rejecting it.

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[42] Use of the mails in furtherance of a scheme to defraud constitutes mail fraud, *Pereira* v. *United States,* 347 U.S. 1, 8 (1954); *Deaver* v. *United States,* 81 U.S.App.D.C. 148, 151, 155 F.2d 740, 743, *cert. denied* 329 U.S. 766 (1946), and pecuniary loss by the victim is not an element of the offense. *Deaver* v. *United States, supra,* 81 U.S.App.D.C. at 150, 151, 155 F.2d at 742, 743; *United States* v. *Andreadis,* 366 F.2d 423, 431 (2d Cir. 1966), *cert. denied* 385 U.S. 1001 (1967); *Adjmi* v. *United States,* 346 F.2d 654, 657 (5th Cir.), *cert. denied,* 382 U.S. 823 (1965). See also *Shaddy* v. *United States,* 30 F.2d 340 (8th Cir. 1929); *Butler* v. *United States,* 53 F.2d 800 (10th Cir. 1931).

[43] This is particularly true in light of the fact that the funds were actually returned to Golf Contractors, the Texas company wholly owned by appellants, not to the Lakewood complex, in payment of the notes and for release of the deed of trust held by Golf Contractors, not the Lakewood complex. There was nothing in the proffer to connect either the security arrangements to appellants' dealings on behalf of Lakewood Country Club, as opposed to their dealings on behalf of their own corporation, Golf Contractors.

[44] The prosecuting attorney informed the trial judge that admission of the evidence would impel him to demonstrate the conservator's efforts to retrieve the funds, and appellants' attempts to interfere with the conservator's efforts.

IV

Lakewood Country Club's litigation against appellants was terminated by a consent order following a settlement agreement pursuant to which appellants relinquished their interests in the Lakewood-connected corporations in exchange for a general release from civil liability arising out of their promotional and managerial activities. The settlement agreement in part provided:

> "It is agreed that all sums heretofore disbursed to or for the benefit of [appellants] or any of them, and/or their agents, whether corporate or otherwise, shall be considered to be full and reasonable consideration for any and all services heretofore rendered by them to . . . Lakewood Country Club, Inc."

Appellants sought to introduce this provision into evidence as a recognition by the representatives[45] of the allegedly defrauded club members that the monies which appellants had used personally were but fair compensation for their services to the club.[46] This, appellants say, in turn indicated that the members were satisfied, and bore importantly upon their good faith while in control of the club's affairs. The trial judge disagreed and rejected the proffer, and we think that he was entirely correct in doing so.

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[45] *Lakewood Country Club, Inc. v. Post, supra* note 13, was a class action brought by the club's then directors on behalf of the club. *Lee* v. *Post, supra* note 13, was brought by the conservator. These actions were later consolidated.

[46] Appellants, pointing to the fact that the civil litigation had been mentioned at the trial, also urge that considerations of fairness dictated admission of the settlement agreement to inform the jury that their "final disassociation" from the club came in consequence of an inter-parties accord rather than permanent ouster by the court. Any need in this regard was supplied by appellant Post's testimony that the suit had been settled and that appellants thereafter had no further association with any of the Lakewood-related corporations.

The settlement agreement does not purport to compose any criminal transgression, and we would deny it legal effect to that extent if it did.[47] We do not, however, gainsay the value to appellants of a showing that they earned the money which they kept for themselves, nor do we dispute their contention that evidence of satisfied customers is admissible in a mail fraud case to show an absence of fraudulent intent.[48] But the settlement instrument states, consistently with what is evident from its context, that its "only purpose [is] to prevent further litigation and to secure a release and discharge of all controversies and disputes which might exist between the parties by virtue of the claims asserted, as well as those which might have been asserted . . . ."

In a transaction so obviously a product of the parties' mutual desire to buy peace, we cannot isolate a reflection of the members' satisfaction with appellants' handling of the club's funds, or a recognition of their entitlement to those which they appropriated.[49] Relinquishment of rights, cancellation of liabilities, acceptance of unwanted covenants, and suppression of hostile emotions are commonplace, if indeed not well nigh inevitable, in the give-and-take of com-

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[47] See *Savitt* v. *United States*, 59 F.2d 541, 544 (3d Cir. 1932); *Seals* v. *United States*, 221 F.2d 243, 249 (8th Cir. 1955); *Commonwealth* v. *Spiegel*, 169 Pa.Super. 252, 82 A.2d 692 (1951); *State* v. *Cooper*, 120 S.C. 280, 113 S.E. 132 (1922). *Cf. Chambers* v. *Buroughs*, 44 App.D.C. 168, 173-74 (1915), *cert. denied* 239 U.S. 649 (1916).

[48] *Worthington* v. *United States*, 64 F.2d 936, 940 (7th Cir. 1933); *United States* v. *Hanrahan*, 255 F.Supp. 957, 969 (D.D.C. 1966), *aff'd sub nom. Tynan* v. *United States*, *supra* note 3.

[49] Compare *Ecklund* v. *United States*, 159 F.2d 81, 83-85 (6th Cir. 1947).

promise,[50] and we discern nothing in this situation to provide an exception. The settlement agreement offered the triers of fact no clear choice respecting the membership's real attitude toward appellants' financial diversions, and it was well within the province of the trial judge to refuse to allow the jury to speculate.

V

Appellants, as we have observed, also challenge the so-called "promoter instruction" by which the trial judge delineated for the jury's edification appellants' obligations as promoters toward Lakewood Country Club and its members.[51] They argue for reversal on the ground that

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[50] As Dean Wigmore has stated, a compromise effort "does not ordinarily proceed from and imply a specific belief that the adversary's claim is well founded, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered." 3 J. Wigmore, Evidence § 1061 at 28 (3d ed. 1940).

[51] The instruction reads:

"The jury are instructed that a promoter is a person who sets in motion machinery that brings about the incorporation and organization of a corporation, brings together the persons interested in the enterprise to be conducted by the corporation, aids in inducing persons to become members of the corporation, and in procuring from them membership fees to carry out purposes set forth in the corporation's articles of incorporation.

"If from the evidence in this case the jury should find beyond a reasonable doubt that the defendants were promoters of Lakewood Country Club, Inc., then you are instructed that the defendants stood in a fiduciary relation to both the corporation as a separate legal entity and the members, including those persons who it was to be anticipated would make application to and would become members in Lakewood Country Club, Inc. Such a fiduciary relationship on the part of the defendants, should you find them to be the promoters of the Lakewood Country Club, Inc., required that they exercise the utmost good faith in their relations with

the promoter concept obtains in criminal law only with respect to stock corporations, and that it becomes anomalous when applied to a nonprofit enterprise such as was involved here. They insist, too, that the instruction equated a breach of the promoter's fiduciary duty with the knavery essential to a conviction for mail fraud, thereby lowering the Government's burden of proof. We disagree with each of these contentions.

By elementary legal principles, promoters stand in a fiduciary relationship exacing good faith in their intracompany activities and demanding adherence to a high stand-

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the corporation and the members, including fully advising the corporation and members, and persons who it was to be anticipated would become members, of any interest which the defendants had that would in any way affect the corporation, the members and anticipated members. Such a full disclosure requirement, if you should find the defendants to be promoters, would obligate them to faithfully make known all facts which might have influenced prospective members in deciding whether or not to purchase memberships. And this full disclosure would include the duty to refrain from misrepresenting any material facts, as well as the duty to make known any personal interest the defendants had in any transaction relating to the country club enterprise.

"Also you are instructed that if you should find beyond a reasonable doubt that the defendants were promoters of the Lakewood Country Club, Inc., and that the funds obtained by them from members of the club corporation to accomplish the purposes of the corporation were used by them for the club's benefit, they were properly used. On the other hand, if you should find beyond a reasonable doubt that the defendants were the promoters of the club corporation, and that they had intentionally converted those funds to their own personal use, such would be a fraud on the members of the club corporation, since such funds were in the nature of trust funds as to which the defendants had a fiduciary obligation. And in that connection you are further instructed that for promoters to knowingly use their fiduciary position to obtain secret profits at the expense of the corporation or its members would not only be a breach of that fiduciary duty but an act of fraud."

ard of honesty and frankness.[52] Not the lesser of the promoter's manifold responsibilities outlaw secret profit-making and command the dedication of corporate funds to corporate purposes.[53] And it cannot be doubted that promoters of stock corporations who employ the mails in deceitful violation of their fiduciary obligations may incur the full condemnation of the law.[54]

We perceice no basis, either in law or in logic, for restricting these precepts to stock corporations.[55] The undergirding considerations are equally germane and potent when a person buys his membership in a nonstock corporation as when stock in a business corporation is purchased. In each case, the purchaser relinquishes his money in the expectation that it will be used in a manner beneficial to his interest in the corporation and consistent with the representations that induced the transaction. We see no reason why the fiduciary concept, which does service in mail fraud prosecutions in the context of both membership and stock organizations,[56] should not have the same range specifically in relation to promoters. We hold that the promoter of a corporation, whether stock or nonstock, as a fiduciary owes a corporate constituent, be he stockholder

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[52] See generally, H. Ballantine, Corporations §§ 356-60 (rev. ed. 1946); 1 W. Fletcher, Corporations §§ 192-96 (1963 rev. vol.).

[53] *Ibid.*

[54] *United States* v. *Painter*, 314 F.2d 939 (4th Cir.), *cert. denied* 374 U.S. 831 (1963). See *United States* v. *Holtzman*, 238 F.2d 141 (7th Cir. 1956); *Bobbroff* v. *United States*, 202 F.2d 389 (9th Cir. 1953).

[55] We are unaware of any case treating the applicability of the promoter concept to a nonstock corporation.

[56] See *United States* v. *Groves*, 122 F.2d 87, 90 (2d Cir.), *cert. denied* 314 U.S. 670 (1941); *United States* v. *Hoffa*, 205 F.Supp. 710, 716 (S.D. Fla.), *cert. denied* 371 U.S. 892 (1962).

or member, the same duties of good faith and fair dealing.[57]

We do not quarrel with the doctrines upon which appellants pitch their second protest against the instruction. Active rather than constructive fraud is prerequisite to conviction for mail fraud.[58] Mere breach of fiduciary obligation does not itself constitute active fraud;[59] there must be a specific intent to defraud.[60] The flaw in appellants' argument, however, is that the instruction given in this case is entirely harmonious with these rules. Among other things, it informed the jury:

> "'[I]f you should find beyond a reasonable doubt that the defendants were the promoters of the club corporation, and that they had *intentionally converted* those funds to their own personal use, such would be a fraud on the members of the club corporation, since such funds were in the nature of trust funds as to which the defendants had a fiduciary obligation. And in that connection you are further instructed that for promoters to *knowingly use* their fiduciary position to obtain secret profits at the expense of the corporation or its members would not only be a breach of that fiduciary duty but an act of fraud.'' [61]

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[57] The situation here is essentially unlike that presented in *Old Dominion Copper Co.* v. *Lewisohn,* 210 U.S. (1908), relied on by appellants. Compare *McCandless* v. *Furland,* 296 U.S. 140, 157-59 (1935).

[58] *Shushan* v. *United States,* 117 F.2d 110, 115 (5th Cir. 1941); *Epstein* v. *United States,* 174 F.2d 754, 765-66 (6th Cir. 1949).

[59] See *Epstein* v. *United States, supra* note 58, 174 F.2d at 766; *United States* v. *Hoffa, supra* note 56, 205 F.Supp. at 715-16.

[60] *United States* v. *Brandt,* 196 F.2d 653, 657 (2d Cir. 1952); *United States* v. *Shavin,* 287 F.2d 647, 649-50 (7th Cir. 1961), *cert. denied* 375 U.S. 944 (1963); *Williams* v. *United States,* 278 F.2d 535, 537 (9th Cir. 1960).

[61] The emphasis is supplied.

By explicating a knowledgeable or purposeful breach of fiduciary duty as an essential characteristic of the conduct upon which a conviction might be rested, the instruction plainly and correctly defined a major type of dishonesty for the facilitation of which the mail fraud statute penalizes the use of the postal service.[62]

Our review of appellants' several claims against the test of the record thus fails to disclose error. The convictions are accordingly

Affirmed.

FAHY, *Senior Circuit Judge, concurring in affirmance:* In my view appellants should have been permitted to show the eventual repayment of the advance to Golf Contractors, Inc., discussed in Part III of the court's opinion. As the court points out, the notes were secured by deed of trust, arranged by appellants, on the Glen Haven property. The full circumstances of this transaction, of which the jury were permitted to have only a part, I think were relevant on the issue of criminality. I do not dissent, however, from affirmance, deeming this restriction upon the evidence not so harmful as to call for reversals.

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[62] See the cases cited *supra* note 56. See also *United States* v. *Buckner*, 108 F.2d 921, 926-27 (2d Cir.), *cert. denied* 309 U.S. 669 (1940).

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 836

TROY V. POST, JR., BILL M. ALLEN, and LEROY W. PICKETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Columbia, petitioners were convicted of conspiracy and twelve counts of mail fraud arising from their promotion and sale of memberships in the Lakewood Country Club in Rockville, Maryland.[1] Petitioner Post was sentenced pursuant

[1] The jury acquitted petitioners on four counts of mail fraud. Three counts were dismissed at the close of the government's case.

to 18 U.S.C. 3651 to concurrent terms of sixteen to forty-eight months imprisonment, with only six months of the sentence to be served in prison and the remainder suspended, and petitioners Allen and Pickett were similarly sentenced to concurrent terms of twelve to thirty-six months' imprisonment, of which only four months were to be served in prison. Each petitioner was also placed on five years' probation, to run concurrently with the prison terms. The court of appeals affirmed (Pet. App. A).

The evidence is set forth in detail in the lengthy opinion of the court below (Pet. 3a-6a), on which we rely. The opinion below amply refutes petitioners' contentions that the "promoter" instruction given by the trial judge detracted from the burden of proof (Pet. 17a-21a) and that the judge erred in declining petitioners' offer of proof concerning the return of certain monies to the Lakewood Country Club from a corporation to which petitioners had improperly diverted the funds (Pet. 7a-9a, 12a-14a).[2]

Petitioners also claim error in the giving of the "Allen" charge (*Allen* v. *United States*, 164 U.S. 492) when, after some fourteen or fifteen hours of deliberation,[3] the jury indicated it was deadlocked.

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[2] The return of the money occurred at a time when petitioners' relationship to Lakewood Country Club had terminated and there was no showing that they played any part in retrieving the funds (Pet. 13a at note 40).

[3] The trial had lasted for thirty-four days over a period of seven weeks. Voluminous evidence had been introduced by both sides, including more than 300 exhibits available to be read in the jury room.

The charge given is set forth at Pet. 9-10. The court of appeals sustained this aspect of the case on the basis of its prior holding in *Fulwood* v. *United States*, 369 F. 2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934. Pet. 3a, note 3. As the decision in *Fulwood* pointed out, the "Allen" charge has been approved by all the courts of appeals which have considered the question. See 369 F. 2d at 961-962. The argument that the charge is inherently coercive is refuted by the carefully balanced language of the instruction which admonishes no juror to surrender a conclusion conscientiously held. Moreover, in this case the jury was permitted to recess and separate for the night after receiving the instruction, thus reducing any possible coercive effect. The fact that the jury resumed deliberations at 9:15 the following morning, but did not reach a verdict until 3:15 p.m., further indicates that the jurors were not "coerced."

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1969.